

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Gilberto Miranda, et al.,

Case No.: 2:23-cv-01780-JAD-DJA

Plaintiffs

Order Denying Cross Motions for Summary Judgment but Dismissing Claims of Miranda and Terry

State Farm General Insurance Company and
State Farm Fire & Casualty Company,

[ECF Nos. 24, 25]

Defendants

Future Science Technology Inc. (FST) conducted a medical study to determine the efficacy of an over-the-counter medication on delayed-onset muscle soreness in the days following 60 participants' short-duration, high-intensity physical exercise. Within 72 hours of the study's start, however, four of the participants ended up in the hospital with a blood condition called rhabdomyolysis, which causes a breakdown of muscle tissue. Those participants sued FST for their injuries in Nevada state court, and FST tendered the claim to its insurer, State Farm, who denied coverage. That state-court action concluded with a stipulated money judgment and FST's assignment of its rights against State Farm.

17 Standing in FST's shoes, the four participants now sue State Farm for breach of the
18 insurance contract, seeking payment of the judgment. They move for partial summary judgment,
19 contending that State Farm's policy covers the bodily injury they suffered so State Farm's denial
20 was a breach as a matter of law. State Farm crossmoves for summary judgment. It argues that
21 the participants' damages do not arise from an accidental occurrence, as required by the policy
22 and, regardless, the loss is expressly excluded by the policy's professional-services and
23 intentional-acts exclusions. It also moves to dismiss the claims of two of the plaintiffs—Gilberto

1 Miranda and Chad Terry—for their failure to participate in this litigation in violation of a court
2 order compelling discovery.

3 Although I find that this incident is a covered occurrence under the policy, a genuine
4 dispute of material fact exists over whether the intentional-acts exclusion bars coverage for the
5 participants' losses, so I deny both summary-judgment motions. But because Miranda and Terry
6 have failed to participate in this litigation, prejudicing State Farm's ability to defend against their
7 allegations, I grant State Farm's request to dismiss their claims. So this case proceeds to trial on
8 the claims of Bonnie Lo and Chad Moffit only. But first I refer it to the magistrate judge for a
9 mandatory settlement conference.

Background

11 Future Sciences Technology Inc., a now-defunct medical-research enterprise, conducted
12 clinical-research studies at Touro University in Henderson, Nevada.¹ One of those studies
13 focused on the efficacy of over-the-counter medication on delayed-onset muscle soreness
14 (DOMS).² The study's 60 participants were instructed to perform squats to induce DOMS.³
15 Once DOMS symptoms appeared, the researchers gathered data on the efficacy of various
16 treatments.⁴ Within 72 hours of starting the exercise required by the study, four of the
17 participants, Gilberto Miranda, Bonnie Lo, Chad Terry, and Thomas Moffitt, developed and
18 were hospitalized for rhabdomyolysis, a condition that can cause breakdown of muscles,
19 compartment syndrome, renal failure, or even death.⁵

²¹ ECF No. 28-1 at 4, ¶ 14.

22] ² *Id.* at 4, ¶ 12.

²² ³ *Id.* at 4, ¶ 15.

23 | ⁴ *Id.* at 4, ¶ 16.

⁵ *Id.* at 4–5, ¶¶ 18, 21, 23.

1 The participants who developed rhabdomyolysis sued FST and its employees in state
 2 court, claiming that they were negligent in directing the participants to perform exercises that
 3 exceeded their abilities, causing them to incur unexpected medical treatment and costs.⁶ FST
 4 tendered the claim to its insurer, State Farm, which denied the claim,⁷ taking the position that the
 5 conduct giving rise to the suit falls outside the scope of FST's commercial-general-liability-
 6 insurance coverage.⁸

7 In state court, the participants obtained a stipulated monetary judgment against FST⁹ and
 8 an assignment of FST's first-party rights against State Farm for the insurance-coverage claim.¹⁰
 9 Relying on that assignment, the participants sue State Farm for breach of contract, alleging that
 10 State Farm had a duty under the insurance policy to defend and indemnify FST, which it
 11 breached by "failing to effectuate a prompt, fair, and equitable settlement of the claim;
 12 misrepresenting pertinent facts and/or insurance provisions to FST relating to coverage at issue
 13 under the terms of the policy; and failing to adopt and implement reasonable standards for the
 14 prompt investigation of claims arising under the policy."¹¹ State Farm removed this coverage
 15 case to federal court based on diversity jurisdiction.¹²

16 The participants now move for summary judgment, contending that "is it clear that" the
 17 insurance policy covers the bodily injury they suffered.¹³ They argue that, as a matter of law,

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 19 ⁶ ECF No. 26-1 at 6–7, ¶¶ 33, 36.

20 ⁷ ECF No. 28-1 at 3, 5, ¶¶ 11, 27–30.

21 ⁸ *Id.* at 5, ¶ 28, 30.

22 ⁹ ECF No. 28-2.

23 ¹⁰ ECF No. 26-1 at 5–6, ¶ 32 (cleaned up).

11 ¹¹ ECF No. 28-1 at 7, ¶ 53.

12 ¹² ECF No 1.

13 ¹³ ECF No. 24 at 7.

1 insurance coverage must be extended by State Farm because all the requirements for insurance
 2 coverage are met. They insist that FST is “legally required to pay damages as a result of the
 3 stipulated judgments,” “the [p]laintiffs’ underlying case was based entirely on personal injury,”
 4 and “no exclusion applies.”¹⁴

5 State Farm crossmoves for summary judgment.¹⁵ It contends that, while the plaintiffs’
 6 hospitalization was an unexpected result of the study, FST intentionally directed the plaintiffs to
 7 engage in exercises with the express goal of developing DOMS, and that intentional act caused
 8 their injuries.¹⁶ Because the plaintiffs’ injuries do not arise from an accidental occurrence, State
 9 Farm argues, they are not covered by the FST policy.¹⁷ Even if they were, the loss alleged by the
 10 plaintiffs is expressly excluded by the policy terms, State Farm adds.¹⁸ It further argues that the
 11 participants have put forward no evidence supporting any claim “under Nevada ‘bad faith’
 12 insurance law.”¹⁹ State Farm also moves to dismiss all claims by Gilberto Miranda and Chad
 13 Terry, two plaintiffs that it says have not participated in this litigation at any point, in violation of
 14 a court order.²⁰

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¹⁴ *Id.* at 8.

20¹⁵ ECF No. 25.

21¹⁶ *Id.* at 8.

22¹⁷ *Id.*

23¹⁸ *Id.* at 15–25.

¹⁹ *Id.* at 25.

²⁰ *Id.*

Discussion

A. This case involves only a single claim for breach of contract.

Before reaching the merits of the parties' arguments, I must clear up what appears to be some confusion about the nature of this case. State Farm offers pages of argument about the plaintiffs' "bad faith" claim and seeks to dismiss it.²¹ The participants caption their motion as one for "partial" summary judgment on their breach-of-contract claim.²² Then, in their response to State Farm's arguments, the participants seem to believe that they have "bad faith" claims.²³ So before addressing the parties' summary-judgment arguments, I first clarify the claims that have actually been pled.

The participants have pled just one claim for breach of contract, and no others.²⁴ The title below is the only one for a cause of action, and it is found on page six of the complaint:²⁵

FIRST CAUSE OF ACTION – BREACH OF CONTRACT

To the extent that the parties believe there is another claim, they have not shown that one exists. At most, the complaint contains one conclusory line in the general allegations stating that State Farm violated Nevada Revised Statute (NRS) § 686A.310 and a few paragraphs regurgitating the statute's elements.²⁶ But the plaintiffs don't assert a claim on that basis—something they did for the breach-of-contract claim—and don't allege any facts to support such a claim. Because

²¹ *Id.* at 25–28.

²² See generally ECF No. 24.

²³ ECF No. 28 at 18.

²⁴ ECF No. 28-1 at 7.

25 *Id.*

²⁶ *Id.* at 6, ¶¶ 37–40.

1 plaintiffs are “the master[s] of [their] complaint and responsible for articulating cognizable
 2 claims,”²⁷ and they have identified only a single claim for relief in their complaint, any
 3 discussion of the application of NRS § 686A.310 or any bad-faith claim would be purely
 4 advisory on the part of this court. So I address the merits of the participants’ breach-of-contract
 5 claim only—the sole claim enumerated in the participants’ amended complaint. There is no
 6 claim in this case for bad faith or a violation of NRS 686A.310.

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**8 B. Genuine issues of material fact about whether the coverage denial constitutes a
 breach of contract precludes complete summary judgment for either side.**

9 The principal purpose of the summary-judgment procedure is to isolate and dispose of
 10 factually unsupported claims or defenses.²⁸ It is appropriate when the pleadings and admissible
 11 evidence “show that there is no genuine issue as to any material fact and that the movant is
 12 entitled to judgment as a matter of law.”²⁹ “At [the] summary-judgment stage” in an insurance
 13 case, “the insured must provide the existence of any potential for coverage, while the insurer
 14 must establish the absence of any such potential.”³⁰

15 In Nevada, insurance policies are treated like other contracts, so legal principles that
 16 apply to contracts generally apply to insurance policies.³¹ “When reading a provision of an
 17 insurance policy, the court’s interpretation ‘must include reference to the entire policy, which

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20²⁷ *Newtok Village v. Patrick*, 21 F.4th 608, 616 (9th Cir. 2021).

21²⁸ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

22²⁹ *Id.* at 322.

23³⁰ *Reese v. Travelers Ins. Co.*, 129 F.3d 1056, 1060 (9th Cir. 1997) (cleaned up). This Ninth Circuit decision analyzes California law, but I find it to be an accurate and cogent distillation of the parties’ burdens in Nevada, too.

24³¹ *Century Sur. Co. v. Andrew*, 432 P.3d 180, 183 (Nev. 2018) (citations omitted).

1 will be read as a whole [] to give reasonable and harmonious meaning to the entire policy.”³² A
 2 breach-of-contract claim in Nevada requires (1) formation of a valid contract, (2) performance or
 3 excuse of performance by the plaintiff, (3) material breach by the defendant, and (4) damages as
 4 a result of the breach.³³ Only the third element—whether State Farm’s refusal to provide
 5 coverage for the participants’ judgment is in dispute here.

6 State Farm contends that the policy does not cover the losses suffered by the plaintiff
 7 participants because they did not result from an accident but rather from intentional conduct.³⁴
 8 Even if it was an “occurrence,” State Farm adds, the policy’s professional-services and
 9 intentional-acts exclusions eliminate any possibility of coverage.³⁵ The participants make the
 10 opposite argument in their own summary-judgment motion.³⁶ They contend that their injuries
 11 were “occurrences” because, although the act of having them perform vigorous exercise was
 12 intentional, their rhabdomyolysis was accidental.³⁷ And they deny the applicability of any
 13 exclusion.³⁸

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³² *Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, 497 P.3d 625, 628 (Nev. 2021) (quoting *Siggelkow v. Phoenix Ins. Co.*, 846 P.2d 303, 304 (1993)).

³³ See *Bernard v. Rockhill Dev. Co.*, 734 P.2d 1238, 1240 (Nev. 1987) (quoting *Malone v. Univ. of Kansas Med. Ctr.*, 552 P.2d 885, 888 (Kan. 1976)).

³⁴ ECF No. 25 at 11.

³⁵ *Id.* at 15–25.

³⁶ See ECF No. 24.

³⁷ *Id.* at 12.

³⁸ *Id.* at 8–12.

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 2 **1. *The participants' rhabdomyolysis was an "occurrence" under the policy because, while having them perform vigorous exercise was intentional, this result was accidental.***

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 4 The policy defines an "occurrence" as "an accident, including continuous or repeated
 5 exposure to substantially the same general harmful conditions."³⁹ State Farm argues that
 6 "[w]ithout some form of accident[al] causative event underlying the asserted loss," "there is no
 7 covered 'occurrence' under the insurance contract, and coverage does not apply."⁴⁰ So the
 8 policy's limitation of coverage to "accidents" "must rationally preclude coverage of damage
 9 arising from intentional acts undertaken by the insured."⁴¹ And because FST called for study
 10 participants to undertake heavy exercise with the intention of causing DOMS, State Farm
 11 argues,⁴² "the complained-of damages were not the result of an 'accident'" and are outside the
 12 scope of the policy's coverage.⁴³

13 The participants respond that the complained-of damages were the result of an accident.
 14 They argue that FST intended to cause only DOMS, not the harmful medical condition
 15 rhabdomyolysis for which they were hospitalized.⁴⁴ "There is no question . . . that this causative
 16 event was unexpected and accidental," they say, because their injuries "were above and beyond
 17 the expected consequences of the process."⁴⁵ The crux of their argument is that the event that

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 19 ³⁹ ECF No. 28-4 at 47.

20 ⁴⁰ ECF No. 24 at 12.

21 ⁴¹ *Id.* at 13.

22 ⁴² *Id.* at 13–14.

23 ⁴³ ECF No. 25 at 12.

24 ⁴⁴ ECF No. 28 at 11.

25 ⁴⁵ *Id.*

1 caused the injury was intentional, but its consequences were not. So the dispute over whether
 2 this event qualifies as an occurrence is not one of fact, but one of law, with State Farm taking the
 3 position that the *act causing* the injury must be accidental, and the participants contending that
 4 only the *result of that act* must be unintended.

5 The Nevada Supreme Court's jurisprudence on "accidental" policy language splits into
 6 two lines of cases. In *Catania v. State Farm Life Insurance Company, Inc.*, a father sued an
 7 insurer seeking to recover accidental-death benefits after his son "choked to death[] [as] a result
 8 of 'acute narotism' occasioned by a self-administered heroin injection."⁴⁶ The life-insurance
 9 policy covered only death caused by "accidental means."⁴⁷ In determining whether the death
 10 triggered that coverage, the Court focused on whether the death itself was intentional. It noted
 11 that the son did not intend or expect death to result from his intentional act of injecting heroin
 12 and held that when "an insured dies as the result of an intentional or expected act or event, but
 13 did not intend or expect death to result, the death is 'accidental' within the contemplation of that
 14 term."⁴⁸

15 The *Catania* scenario is materially distinguishable from that in *Beckwith v. State Farm*,⁴⁹
 16 the Nevada Supreme Court case that State Farm relies on to argue that the instant situation is not
 17 a covered occurrence because the act that resulted in the harm was intentional.⁵⁰ Beckwith was
 18 high on drugs and hallucinating when he struck his neighbor in the face, rupturing his eye.⁵¹ The

20⁴⁶ *Catania v. State Farm Life Ins. Co., Inc.*, 598 P.2d 631, 632 (Nev. 1979).

21⁴⁷ *Id.*

22⁴⁸ *Id.* at 633.

23⁴⁹ *Beckwith v. State Farm Fire & Cas. Co.*, 83 P.3d 275, 277 (Nev. 2004).

⁵⁰ ECF No. 25 at 12.

⁵¹ *Beckwith*, 83 P.3d at 276.

1 neighbor sued, and Beckwith tendered the claim to his homeowner's insurance company, State
 2 Farm, which sought a declaration of non-coverage.⁵² Just as it does here, State Farm then took
 3 the position that "the incident was not a covered 'occurrence'" because the incident was no
 4 accident.⁵³ Beckwith and the neighbor argued that the act was not intentional because Beckwith
 5 lacked the requisite state of mind: "given [Beckwith's] advanced state of intoxication, he did not
 6 intend to injure [his neighbor] and . . . believed he acted in self-defense."⁵⁴ The Nevada
 7 Supreme Court found that the incident was "a non-accidental intentional act even if Beckwith did
 8 not intend to harm" the neighbor.⁵⁵ It noted its observation in *Mallin v. Farmers Insurance*
 9 *Exchange*⁵⁶ when considering "a similarly worded insurance policy" that "intent or intention
 10 denotes a design or desire to cause the consequences of one's acts and a belief that given
 11 consequences are substantially certain to result from the acts."⁵⁷ And it reasoned that Beckwith's
 12 "supposed inability to control his acts was not the same as an inability to intend his acts,"⁵⁸ so his
 13 attack "was not an occurrence under the insurance policy."⁵⁹

14 *Beckwith* merely reinforces the *Mallin* notion that an incident isn't accidental under such
 15 policies if its consequences were substantially certain to result from an intended act. So when a
 16 molestation victim relied on *Catania* to claim coverage under a homeowner's policy with a
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18⁵² *Id.*

19⁵³ *Id.*

20⁵⁴ *Id.* at 277.

21⁵⁵ *Id.*

22⁵⁶ *Mallin v. Farmers Ins. Exch.*, 797 P.2d 978, 979 (1990), overruled on other grounds by *Matter*
Est. of Sarge, 432 P.3d 718 (2018).

23⁵⁷ *Beckwith*, 83 P.3d at 277 (quoting *Mallin v. Farmers Ins. Exch.*, 839 P.2d 105, 106 (Nev.
 1992)).

⁵⁸ *Id.* (quoting *Mallin*, 839 P.2d at 107).

⁵⁹ *Id.*

similar “occurrence” definition in *State Farm Fire & Casualty Co. v. Smith*, the Ninth Circuit rejected that effort.⁶⁰ The victim sought damages for emotional and psychological harm caused by her step-father’s sexual abuse and argued that, because he claimed that he never intended for his conduct to harm the child, the occurrence was accidental.⁶¹ “There is a crucial distinction between *Catania* and this case,” the panel explained.⁶² “The policyholder in *Catania* injected heroin; a dangerous and unwise act to be sure, but not one that normally—far less, inevitably—results in immediate death. Thus, the Nevada Supreme Court, while recognizing that the injection itself was deliberate, chose to characterize the death caused by the injection as the result of ‘mishap, mischance or misjudgment.’”⁶³ But the step-father’s act of molestation was “not the kind of act [that] results in emotional and psychological harm only occasionally; Nevada law conclusively presumes that such conduct will be harmful in every case and therefore makes it illegal.”⁶⁴ “Consequently, . . . one cannot intend the act of molestation without also intending the harm.”⁶⁵

The instant case is more *Catania* than *Beckwith*. Like the death from heroin use in *Catania*, the rhabdomyolysis was an accidental result of an intentional act. The goal of the FTS study was to evaluate recovery from DOMS and determine the effectiveness of over-the-counter medications in assisting that recovery. While FST intentionally had the study participants engage in exercises that would cause DOMS, the record shows, and State Farm concedes, these

⁶⁰ *State Farm Fire & Cas. Co. v. Smith*, 907 F.2d 900, 903 (9th Cir. 1990).

⁶¹ *Id.* at 902.

⁶² *Id.*

⁶³ *Id.* (quoting *Catania*, 598 P.2d at 632).

⁶⁴ *Id.*

⁶⁵ *Id.*

1 four participants suffered “extreme results” that “exceeded the level of injury/damage
 2 contemplated by the FST study.”⁶⁶ State Farm states in its own motion for summary judgment
 3 that it “concede[s] that there clearly exists an accident[al] *result*: There is no indication that FST
 4 or its principals actually intended for any of their test subjects to require hospitalization.”⁶⁷ In
 5 short, although the FST researchers intended to cause the participants to experience DOMS, like
 6 the death from heroin use in *Catania*, the harm of rhabdomyolysis was precisely the kind of
 7 harm that results only occasionally. So the rhabdomyolysis was “accidental” and thus a covered
 8 occurrence under FTS’s State Farm policy.

9 This conclusion is consistent with the Ninth Circuit’s analysis of policy language
 10 identical to FST’s in *Anthem Electronics, Inc. v. Pacific Employers Insurance Company*.⁶⁸ That
 11 policy defined an occurrence as “an accident, including continuous or repeated exposure to
 12 substantially the same general harmful conditions which result in bodily injury or property
 13 damage.”⁶⁹ “The operative word,” the court, noted, “is *accident*,”⁷⁰ so “at bottom an occurrence
 14 is simply an unexpected consequence of an insured’s act, even if due to negligence or faulty
 15 work.”⁷¹ The court observed that, in this context, “accidents need not crash or clatter; they need
 16 only be unexpected consequences, and they may result even from the insured’s own
 17 negligence.”⁷² “Put another way, ‘when the injury or property damage is an unexpected or
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19 ⁶⁶ ECF No. 25 at 8.

20 ⁶⁷ *Id.* at 13.

21 ⁶⁸ *Anthem Elect., Inc. v. Pacific Emp. Ins. Co.*, 302 F.3d 1049 (9th Cir. 2002).

22 ⁶⁹ *Id.* at 1053.

23 ⁷⁰ *Id.* at 1054.

⁷¹ *Id.*

⁷² *Id.* at 1055.

1 unintended consequence of the insured's conduct, it may be characterized as an accident for
 2 which coverage exists.”⁷³ Here, the injury—the rhabdomyolysis—was an unexpected or
 3 unintended consequence, so it may be characterized as an accident covered by the FTS policy. I
 4 therefore find that the participants' injury was “accidental” and thus a covered occurrence under
 5 the policy.

6 **2. *The professional-services exclusion does not apply.***

7 State Farm argues that, even if the participants' injury was an occurrence under the
 8 policy, it is explicitly excluded by the professional-services exclusion,⁷⁴ which excludes
 9 coverage for “bodily injury” “arising out of the rendering or failure to render any professional
 10 service or treatment.”⁷⁵ The policy provides a non-exhaustive list of qualifying professional
 11 services:

- 12 a. Legal, accounting or advertising services;
- 13 b. Preparing, approving, or failing to prepare or approve maps, shop
 drawings, opinions, reports, surveys, field orders, change orders or
 drawings and specifications;
- 14 c. Supervisory, inspection, architectural or engineering activities;
- 15 d. Treatment, advice or instruction of any medical, surgical, dental, x-ray or
 nursing services;
- 16 e. Treatment, advice or instruction of any health or therapeutic services;
- 17 f. Any service, treatment, advice or instruction for the purpose of appearance
 or skin enhancement, hair removal or replacement or personal grooming;
- 18 g. Optometry or optical or hearing aid services including the prescribing,
 preparation, fitting, demonstration or distribution of ophthalmic lenses and
 similar products or hearing aid devices;
- 19 h. Body piercing services;
- 20 i. Services in connection with the practice of pharmacy;
- 21 j. Handling, embalming, disposal, burial, cremation or disinterment of dead
 bodies; and
- 22 k. Veterinary services or treatments.⁷⁶

⁷³ *Id.* (quoting *Chu v. Canadian Indem. Co.*, 224 Cal. App.3d 86, 96 (Cal. Ct. App. 1990)).

⁷⁴ *Id.* at 15.

⁷⁵ *Id.* at 17.

⁷⁶ ECF No. 28-4 at 38.

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2 Neither side claims that the research study fits squarely within any of these illustrative
3 categories. State Farm contends that the participants' losses fit within this exclusion because
4 "the activities of FST and its principals clearly involved specialized skills and exercises of
5 professional discretion," and the study had "the express purpose of medical research."⁷⁷ The
6 participants focus instead on the fact that the study did not provide them any professional
7 services or treatment.⁷⁸ Unlike the eleven categories of professional services enumerated in the
8 policy, they say, this study was not for the participants' benefit but for "examination and
9 knowledge purposes."⁷⁹

10 If an insurer wants to exclude coverage under a policy in Nevada it must "(1) write the
11 exclusion in obvious and unambiguous language in the policy, (2) establish that the interpretation
12 excluding cover[age] under the exclusion is the only interpretation of the exclusion that could
13 fairly be made, and (3) establish that the exclusion clearly applies to this particular case."⁸⁰ And
14 courts must "narrowly construe any clauses that exclude coverage."⁸¹ State Farm falls far short
15 of making this showing. The act of performing a research study is not listed in the professional-
16 services exclusion, and it doesn't fit—even poorly—into any of the categories of activities that
17 are. As the participants point out, all of the categories identified in the exclusion are services
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21 ⁷⁷ ECF No. 25 at 20.

22 ⁷⁸ ECF No. 28 at 15.

23 ⁷⁹ *Id.*

24 ⁸⁰ *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 674 (Nev. 2011).

25 ⁸¹ *Deutsche Bank Nat'l Tr. Co. v. Fidelity Nat'l Title Ins. Co.*, 536 P.3d 915, 922 (Nev. 2023).

1 provided to another person.⁸² But the participants in this study were not having a service
 2 provided to them. So I find that the professional-services exclusion does not apply in this case.

3 **3. *A genuine dispute of material fact exists over whether the intentional-acts***
 4 ***exclusion applies.***

5 As its final coverage argument, State Farm contends that coverage is barred by the
 6 policy's intentional-acts exclusion.⁸³ This exclusion reads that "insurance does not apply to . . .
 7 ' [b]odily injury' or 'property damage expected or intended to cause harm as would be expected
 8 by a reasonable person."⁸⁴ State Farm contends that a plain reading of this provision excludes
 9 coverage for the participants' injuries because "FST intentionally inflicted physical harm on the
 10 [] test subjects in order to study their rate of recovery."⁸⁵ The participants respond that the type
 11 of injury they suffered "would not be expected by a reasonable person" and thus would not fall
 12 under this intentional-acts exclusion.⁸⁶

13 The Nevada Supreme Court has repeatedly upheld the enforceability of intentional-acts
 14 exclusions in insurance policies.⁸⁷ When upholding these exclusions, it has held that Nevada
 15 courts must not "rewrite unambiguous insurance-policy provisions or attempt to increase the

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 19 ⁸² See ECF No. 24 at 10.

20 ⁸³ ECF No. 25 at 15.

21 ⁸⁴ ECF No. 28-4 at 35 (emphasis added).

22 ⁸⁵ ECF No. 25 at 16 (cleaned up).

23 ⁸⁶ ECF No. 28 at 13.

24 ⁸⁷ See, e.g., *Fire Ins. Exch. v. Cornell*, 90 P.3d 978 (Nev. 2004); *Mallin v. Farmers Ins. Exch.*,
 25 839 P.2d 105 (Nev. 1992); *Morrison v. Fire Ins. Exch.*, 2013 WL 3936895 (Nev. 2013).

1 parties' legal obligations where the parties intentionally limited such obligations."⁸⁸ And had
 2 State Farm excluded all "bodily injury," this provision would preclude coverage here.

3 But this exclusion contains a squishy modifier. It excludes "bodily injury expected or
 4 intended to cause harm as would be expected *by a reasonable person*."⁸⁹ The qualifier "expected
 5 by a reasonable person" makes clear that this intentional-acts exclusion applies only to the type
 6 of harm that a reasonable person would conclude was expected or intended.

7 The Nevada Supreme Court has recognized that "if reasonable persons could draw
 8 different inferences from the facts, the question is one of fact for the jury and not one of law for
 9 the court."⁹⁰ And that's the case here. Whether "a reasonable person" "would [] expect[]" the
 10 bodily injury that the participants experienced can be answered two ways on this record. A
 11 reasonable jury could find that rhabdomyolysis was the type of harm "as would be expected by a
 12 reasonable person" after they were instructed to engage in short-duration, high-intensity physical
 13 exercise designed to achieve DOMS. But a reasonable jury could also find that the harm the
 14 participants suffered would not be expected by a reasonable person, particularly when State Farm
 15 concedes that "the harm suffered by the [p]laintiffs . . . was more severe than anticipated by FST
 16 and its principals."⁹¹ Because a reasonable jury could decide this factual issue either way based
 17 on this record, summary judgment on the applicability of this exclusion is unavailable to either
 18 side.

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 21⁸⁸ *State Farm Mut. Auto Ins. v. Cramer*, 857 P.2d 751 (Nev. 1993) (cleaned up) (citing *Senteney*
 22 *v. Fire Ins. Exch.*, 707 P.2d 1149, 1150 (Nev. 1985)).

23⁸⁹ ECF No. 28-4 at 35.

⁹⁰ *Broussard v. Hill*, 682 P.2d 1376, 1377 (Nev. 1984).

⁹¹ ECF No. 25 at 16–17.

1 C. **Because Plaintiffs Gilberto Miranda and Chad Terry have failed to participate in
2 this litigation and the relevant factors favor the dismissal of their claims, their
claims are dismissed.**

3 State Farm also moves to dismiss the claims brought by Gilberto Miranda and Chad
4 Terry based on their failure to participate in this litigation. It argues that this sanction is
5 appropriate because Miranda and Terry have failed to respond to written discovery requests
6 despite having received warnings that sanctions may be imposed if no responses were
7 provided.⁹² The plaintiffs respond that “dismissal is an overly harsh sanction that should be
8 reserved for only the most extreme circumstances” and that “[l]ess severe alternatives should be
9 considered before resorting to outright dismissal.”⁹³

10 District courts have the inherent power to control their dockets and “[i]n the exercise of
11 that power, they may impose sanctions including, where appropriate . . . dismissal” of claims.⁹⁴
12 A court may dismiss an action based on a party’s failure to obey a court order or comply with
13 local rules.⁹⁵ In determining whether to dismiss an action on this ground, the court must
14 consider: (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to
15 manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring
16 disposition of cases on their merits; and (5) the availability of less drastic alternatives.⁹⁶ “[T]he
17 key factors are prejudice and availability of less drastic sanctions.”⁹⁷ In particular, the Ninth
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19 ⁹² *Id.* at 7.

20 ⁹³ ECF No. 28 at 3.

21 ⁹⁴ *Thompson v. Hous. Auth. of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986).

22 ⁹⁵ *Malone v. U.S. Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987) (dismissal for failure to
comply with court order); *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal
for lack of prosecution and failure to comply with local rules).

23 ⁹⁶ *In re Phenylpropanolamine Prod. Liab. Litig.*, 460 F.3d 1217, 1216 (9th Cir. 2006) (quoting
Malone, 833 F.2d at 130).

24 ⁹⁷ *Hester v. Vision Airlines*, 687 F.3d 1162, 1169 (9th Cir. 2012) (quotation omitted).

1 Circuit has found that the element of prejudice is essential, and “sanctions [that] interfere with
 2 the litigants’ claim or defenses violate due process when they are imposed ‘merely for
 3 punishment of an infraction that did not threaten to interfere with the rightful decision of the
 4 case.’”⁹⁸ To warrant the drastic sanction of claim dismissal, the malfeasance must be due to
 5 “willfulness, fault, or bad faith.”⁹⁹ But “disobedient conduct [within] the control of the litigant is
 6 all that is required to demonstrate willfulness, bad faith, or fault.”¹⁰⁰

7 The first two factors, the public’s interest in expeditiously resolving this litigation and the
 8 court’s interest in managing its docket, weigh in favor of dismissing Miranda and Terry’s claims.
 9 The third factor, risk of prejudice to defendants, also weighs in favor of dismissal because a
 10 presumption of injury arises from the occurrence of unreasonable delay.¹⁰¹ State Farm has not
 11 received responses from Miranda or Terry though it filed a motion to compel responses to
 12 discovery.¹⁰² And despite written discovery being propounded on all four plaintiffs, their May 3,
 13 2024, deadline has long passed.¹⁰³ As of June 17, 2024, Terry’s own counsel has been unable to
 14 get in touch with him.¹⁰⁴ Miranda informed his counsel on June 5, 2024, that he was working on
 15 his responses,¹⁰⁵ but no update about these responses has been given to the court. The fourth
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17 ⁹⁸ *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990).

18 ⁹⁹ *Anheuser-Busch, Inc. v. Nat. Beverage Distrib.*, 69 F.3d 337, 348 (9th Cir. 1995) (internal
 quotations and citations omitted) (cleaned up); *Jorgensen v. Cassiday*, 320 F.3d 906, 912 (9th
 Cir. 2003); *Toyrific v. Karapetian*, 606 F.App’x 365 (9th Cir. 2015) (unpublished).

20 ¹⁰⁰ *Henry v. Gill Inds.*, 983 F.2d 943, 948 (9th Cir. 1993) (internal quotations omitted) (cleaned
 up).

21 ¹⁰¹ See *Anderson v. Air W.*, 542 F.2d 522, 524 (9th Cir. 1974).

22 ¹⁰² See ECF No. 25 at 7.

23 ¹⁰³ See ECF No. 15 at 3.

¹⁰⁴ *Id.* at 5.

¹⁰⁵ *Id.*

1 factor—the public policy favoring disposition of cases on their merits—is greatly outweighed by
 2 the factors favoring dismissal.

3 The fifth factor requires the court to consider whether less drastic alternatives can be used
 4 to correct the party’s failure that brought about the court’s need to consider dismissal.¹⁰⁶ Courts
 5 “need not exhaust every sanction short of dismissal before finally dismissing a case, but must
 6 explore possible and meaningful alternatives.”¹⁰⁷ Because Miranda and Terry have not complied
 7 with the magistrate judge’s August 2024 order compelling their responses to discovery requests
 8 or otherwise participated in this action, the only alternative is to enter another order setting a new
 9 deadline requiring their compliance. But the reality of repeating an ignored order is that it often
 10 only delays the inevitable and squanders finite resources along the way. The circumstances here
 11 do not indicate that this case will be an exception: there is no hint that Miranda and Terry need
 12 additional time or evidence that they did not receive the court’s order. Setting another deadline
 13 is not a meaningful alternative given these circumstances. So the fifth factor favors dismissal.
 14 Because these factors favor dismissal of Miranda and Terry’s claims, and nothing suggests that
 15 they haven’t abandoned this litigation, I grant State Farm’s motion to dismiss the claims of these
 16 two plaintiffs only.

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 20¹⁰⁶ *Yourish v. Cal. Amplifier*, 191 F.3d 983, 992 (9th Cir. 1999) (explaining that considering less
 21 drastic alternatives before the party has disobeyed a court order does not satisfy this factor);
 22 *accord Pagtalunam v. Galaza*, 291 F.3d 639, 643 & n.4 (9th Cir. 2002) (explaining that “the
 23 persuasive force of” earlier Ninth Circuit cases that “implicitly accepted pursuit of less drastic
 alternatives prior to disobedience of the court’s order as satisfying this element[,]” i.e., like the
 “initial granting of leave to amend coupled with the warning of dismissal for failure to
 comply[,]” have been “eroded” by *Yourish*).

¹⁰⁷ *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986).

Conclusion

2 IT IS THEREFORE ORDERED that the parties' motions for summary judgment [ECF
3 Nos. 24, 25] are DENIED, except as to State Farm's request to dismiss the claims of
4 Plaintiffs Gilberto Miranda and Chad Terry, which is GRANTED. So the claims of
5 Miranda and Terry are DISMISSED with prejudice, and the Clerk of Court is directed to
6 TERMINATE them as parties.

The net result of this order is that this case proceeds on Plaintiffs Bonnie Lo and Thomas Moffitt's breach-of-contract claim. The question of whether the underlying circumstances constitute an occurrence under the policy (they do) is resolved by this order, as is the inapplicability of the professional-services exclusion. So the only coverage question remaining for trial is whether the intentional-acts exclusion applies.

12 IT IS FURTHER ORDERED that this case is **REFERRED** to the magistrate judge for
13 a **mandatory settlement conference**. The parties' obligation to file a joint pretrial order is
14 **STAYED** until 10 days after that settlement conference.


U.S. District Judge Jennifer A. Dorsey
June 4, 2025